IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2003 Session

JACK EDWARD FORREST v. CITY OF RIDGETOP and KEN PARSONS, in his official capacity as Police and Fire Commissioner, PAUL MYER, in his official capacity as Chief of Police, and DARRELL DENTON, in his official capacity as Mayor

Appeal from the Circuit Court for Robertson County
No. 9188 Ross Hicks, Judge

No. M2002-01176-COA-R3-CV - Filed August 15, 2003

The plaintiff, Jack Edward Forrest, brought this wrongful discharge action against the defendants, City of Ridgetop, Commissioner of Police and Fire Ken Parsons, Chief of Police Paul Myers and Ridgetop Mayor Darrell Denton. The defendants moved for summary judgment, relying upon affidavits and statements of undisputed material facts purporting to show that the plaintiff was discharged for failure to uphold a minimum standard of conduct, evidenced by insubordination, disobedience to a written directive, use of a recording device at a staff meeting and use of a personal vehicle for police action. The trial court, in granting summary judgment, found that the plaintiff failed to prove a prima facie case that he was wrongfully discharged from his employment in violation of the Public Protection Act of Tennessee, T.C.A.§ 50-1-304, and failed to prove the reasons given for his termination by the City of Ridgetop were pretextual. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

Carol L. McCoy, Special Judge, delivered the opinion of the court, in which Patricia J. Cottrell, J., and William B. Cain, J., joined.

James L. Harris, Nashville, Tennessee, for the appellant, Jack Edward Forrest.

William Bates, Nashville, Tennessee, for the appellees, City of Ridgetop, Ken Parsons, Paul Myers and Darrell Denton.

O P I N I O N

I. BACKGROUND

The plaintiff, Jack Edward Forrest, was employed by the City of Ridgetop in August, 1997 as a police office; he was promoted to Detective in September, 1998. On April 1, 1999, Interim Police Chief Paul Myers issued a memoranda terminating Mr. Forrest for failure to uphold a minimum standard of conduct, citing four examples of Mr. Forrest's misconduct. The four examples were: (1) insubordination regarding traffic stops, (2) disobeying written directive regarding written warnings, (3) police action while in POV (privately owned vehicle), and (4) use of recording device at staff meetings. On January 4, 2000, Mr. Forrest filed a wrongful discharge suit against the City of Ridgetop and the other defendants. He alleged that he was terminated for refusing to participate in or to remain silent about illegal activities and thus was entitled to file suit against his employer for retaliatory discharge pursuant to the Tennessee Public Protection Act, T.C.A. § 50-1-304, (hereinafter "TPPA").[1]

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[1] T.C.A. § 50-1-304. **Discharge for refusal to participate in or remain silent about illegal activities, or for legal use of agricultural product - Damages - Frivolous lawsuits.** (a) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.

(b) In addition to all employees in private employment, the provision of this section shall apply to all employees who receive compensation from the federal government for services performed for the federal government, notwithstanding that such persons are not full-time employees of the federal government.

(c) As used in this section, "illegal activities" means activities which are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.

(d) Any employee terminated in violation of subsection (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled. [Amended July 1, 2000 to add (d)].

(e)(1) No employee shall be discharged or terminated solely for participating or engaging in the use of an agricultural product not regulated by the alcoholic beverage commission that is not otherwise proscribed by law, if such employee participates or engages in such use in a manner which complies with all applicable employer policies regarding such use during times at which such employee is working.

(2) No employee shall be discharged or terminated solely for participating or engaging in the use of such product not regulated by the alcoholic beverage commission which is not otherwise proscribed by law if such employee participates or engages in such activity during times when such employee is not working.

(f)(1) This section shall not be used for frivolous lawsuits, and anyone trying to do so is subject to sanction as provided in subdivision (f)(2).

(2) If any employee files a cause of action for retaliatory discharge for any improper purpose, such as to harass or to cause needless increase in costs to the employer, the court, upon motion or upon its own initiative, shall impose upon the employee an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred, including reasonable attorney's fee.

In his Complaint, Mr. Forrest charged that Mayor Denton directed him to fix traffic tickets and that Commissioner Parsons obstructed justice by interfering with an investigation of Officer Kevin Hensley, who had been accused of sexual assault and other illegal activities. Mr. Forrest claimed that he was wrongfully terminated after he gave two tape recordings that illustrated the alleged illegal activities to the Tennessee Bureau of Investigation. The defendants denied these allegations, asserting that they are immune from liability under the Governmental Tort Liability Act, T.C.A. §§ 29-20-101, et seq., and further, that Mr. Forrest had failed to state a claim upon which relief could be granted. The defendants also denied any liability for punitive damages, counterclaiming that Mr. Forrest's lawsuit was frivolous and without legal merit and requesting damages, including attorney's fees, pursuant to T.C.A. § 50-1-304. Upon proper motion, the Court granted the defendants summary judgment. Mr. Forrest now appeals from the order of summary judgment that dismissed his lawsuit.

II. STANDARD OF REVIEW

The standard of review is well settled. This Court reviews the record *de novo* to determine first whether any genuine issue of material fact exists, and second whether the defendant is entitled to judgment as a matter of law. Where a question of law is involved, no presumption of correctness attaches to the Trial Court's judgment. *Union Carbide v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). Summary judgment is appropriate only when the moving party demonstrates that there are

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(g) As used in this section:
(1) "Employee" includes an employee of the state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity thereof; and
(2) "Employer" includes also the state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity thereof.

no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, "[c]ourts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor." *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). "If both the facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion, then summary judgment is appropriate." *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 91 (Tenn. 1999); *Webber v. State Farm Mutual Automobile Insurance Company*, 49 S.W.3d 265, 269 (Tenn. 2001).

Upon filing the motion for summary judgment, the defendants must demonstrate that there are no material facts in dispute and as a matter of law, that judgment in their favor is appropriate. Under the shifting burden of proof as set out below, they must produce evidence of legitimate and non-discriminatory reasons for Mr. Forrest's termination in order to prevail.

III. DISCUSSION

A. Framework for the Analysis

(I) Statutory claim: In the proceedings before the trial court, the employee claimed that he was terminated from his employment in violation of the TPPA. This statute, commonly referred to as the Whistle Blower Statute, requires that no employee be discharged or terminated solely for refusing to participate in or refusing to remain silent about illegal activities. In order to determine if a violation of the statute has occurred, Tennessee courts have relied upon the shifting burden of proof analysis developed in federal law under Title VII. *Smith v.*

Bridgestone/Firestone, Inc., 2 S.W.3d 197, 200 (Tenn. Ct. App. 1999). Initially, the plaintiff must produce sufficient evidence to establish a prima facie case. The plaintiff's prima facie case shifts only the burden of production. If a prima facie case is presented, the defendant must rebut any legal presumption of intentional discrimination. Thereafter, the trier of fact must determine whether the plaintiff has proven intentional discrimination by producing sufficient evidence, that is, specific admissible facts, to negate the employer's explanation. *Id. at 201-02.*

To establish a prima facie case of retaliatory discharge, the employee must show a causal relationship between a refusal to participate in or to remain silent about illegal activities and the employer's termination of the employee. *Voss v. Shelter Mutual Ins. Co.*, 958 S.W.2d 342, 344 (Tenn. Ct. App. 1997). The employee must establish that the employer's action was based solely on impermissible grounds. *Guy v. Mutual of Omaha*, 79 S.W. 3d 528, 535 (Tenn. 2002). The employee must also demonstrate a contemporaneous fear or threat of dismissal that led him or her to contemplate the choice between remaining silent (or refusing to participate) and reporting the illegal activity. *Griggs v. Coca-Cola Employees' Credit Union*, 909 F. Supp. 1059, 1064 (E.D. Tenn. 1995). If the employee has met these requirements, he is deemed to have established a prima facie case of retaliatory discharge. To rebut such a prima facie case and to avoid liability, the employer is required to produce a legitimate nondiscriminatory reason for the termination of the employee. *Guy, supra* at 534. Thereafter, in order to ultimately prevail, the employee must show by a preponderance of the evidence either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). The employee cannot rely upon conclusory statements or the employee's subjective

interpretation of the employer's actions to create a material factual dispute. *Wilson v. Rubin*, 104 S.W.3d 39, 47 (Tenn. 2002). The employee must present specific admissible facts, which realistically challenge the employer's reason for the termination of the employee. *Hubrig v. Lockheed Martin Energy Sys Ins.*, NO. 03A01-9711-CV-00525, 1998 WL 240128, *8 (Tenn. Ct. App. May 4, 1998)(perm. app. denied Oct 12 ,1998).

(ii) Common law claim: On appeal, the employee alleged for the first time a violation of the common law tort of retaliatory discharge, asserting that to meet his burden of proof, he was only required to show his protected conduct was a substantial factor in his employer's decision to terminate him. The employer responded that the employee did not allege a cause of action for common law retaliatory discharge in his complaint, never raised the issue until he filed his brief on appeal and was improperly attempting to add this common law claim.

An appellate court's *de novo* review of a summary judgment considers the record that was presented to the trial court. In this instance, the trial court's order did not address any common law tort of retaliatory discharge for whistleblowing, nor does it appear from the record that the claim was raised in the pleadings or at the time of the hearing on the motion for summary judgment. In civil cases, an appellate court will not, as a general rule, pass upon any question raised for the first time on appeal. *Brookside Mills v. Moulton*, 404 S.W.2d 258, 263 (1965). This issue, therefore, should not have been raised on appeal.[2] *Moon v. St. Thomas Hospital*, 983 S.W.2d 225, 229 (Tenn. 1998) (citing *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) and *Moran v. City of Knoxville*, 600 S.W.2d 725 (Tenn. Ct. App. 1979)) and accordingly, this Court will not consider this claim at this

[2] The defendants asserted in oral argument that had the plaintiff alleged the common law tort of retaliatory discharge for whistleblowing, the city would have employed an immunity defense.

late date.

B. Analysis of the facts

(i) Ticket fixing: Mr. Forrest alleged that he was terminated on April 1, 1999 in retaliation for his refusal to obey a directive from Mayor Denton to dismiss a traffic ticket that he wrote to Diane Aires, a purported friend of the Mayor and the school bus driver for the Mayor's minor daughter. However, Mr. Forrest did not produce any evidence that the Mayor terminated him as a result of his refusal to dismiss the traffic ticket. The parties agreed that Police Chief Myers terminated Mr. Forrest with the concurrence of Police Commissioner Parsons. While Mr. Forrest stated that he believed that Mayor Denton concurred in the decision, the record reflects that the Chief and the Commissioner terminated Mr. Forrest. Only after the decision was made did they tell the Mayor of Mr. Forrest's termination. While the Mayor may have concurred in the decision after the fact, Mr. Forrest did not produce evidence that the Mayor directed him to dismiss a traffic ticket or that the Mayor participated in the termination decision. Further, he did not demonstrate how his refusal to dismiss the ticket caused the Police Chief and Police Commissioner to terminate him. To prevail, Mr. Forrest must show that his protected activity was the cause of his termination.

(ii) Warnings, Not Tickets: Mr. Forrest also claimed that he was terminated in retaliation for speaking with the TBI regarding his allegation that Mayor Denton had urged him to give traffic warnings, rather than traffic citations, to citizens of Ridgetop. Again, Mr. Forrest presented no evidence that Mayor Denton terminated him as result of this conversation, that the Mayor participated in the termination decision, or that the Mayor had knowledge that he had spoken to the TBI. Absent evidence that the Mayor terminated him for giving citations instead of warnings, Mr.

Forrest cannot rely upon mere allegations to prove the necessary causal relationship between his termination and his purportedly protected activity.

(iii). Tape recordings. Mr. Forrest also claimed that he was terminated in retaliation for delivering two tape recordings to the Tennessee Bureau of Investigation; he alleged that he had recorded illegal activities on these tapes. Mr. Forrest turned the two tapes over to the TBI in January and February of 1999. The first tape recorded Mr. Forrest conversing with Mayor Denton in October of 1998 about the school bus driver and the Mayor's alleged illegal request that her ticket be dismissed. The second audio cassette recorded a conversation in July of 1998 between Mr. Forrest and the woman who accused City of Ridgetop Officer Kevin Hensley of sexual assault. According to Mr. Forrest, Commissioner Parsons was interfering with his investigation of Mr. Hensley.

Other than the tapes, Mr. Forrest submitted no evidence regarding Commissioner Parsons' conduct.[3] Similarly, he submitted no evidence of Police Chief Myers' conduct. He produced no evidence that Police Chief Myers knew that Mr. Forrest had talked to the TBI. Chief Myers testified that at the time of Mr. Forrest's termination, he did not know that Mr. Forrest had spoken with the TBI, nor did he know that Mr. Forrest had given tape recordings to the TBI. Mr. Forrest submitted no additional evidence that his delivery of tapes to the TBI caused his termination. We find that Mr. Forrest did not carry his burden of production by showing a causal relationship between his termination and his contact with the TBI.

(iv) Pursuit in a private vehicle. Finally, Mr. Forrest claims that he was terminated in

[3] Mr. Forrest alleged that he was perceived by others to be involved with the former Ridgetop Police Chief, James Hunt, who refused to remain silent about Commissioner Parson's alleged interference with the Hensley investigation. However, the record lacks any evidence of illegal conduct by Commissioner Parsons.

retaliation for refusing to participate in an illegal activity, that is, failing to carry out his sworn duty to uphold the law. Mr. Forrest acknowledged that on February 19, 1999, he used his own private vehicle to pursue a driver that he suspected of criminal activity, even when the pursuit led outside the city limits of Ridgetop and into the city limits of Greenbriar. The written policy for officers responding to emergencies states:

> c. Responding to emergencies, calls for service. . . .
>
> 2) Response in a privately owned vehicle. Some officers have been authorized to equip their privately owned vehicles (POV) with emergency equipment. Such vehicles are not to exceed the posted speed limit, for any reason, without making use of such equipment. Furthermore, officers may only make use of such equipment when the nature of the call is such that their immediate response is absolutely necessary and failure to respond as quickly as possible may result in serious injury, death or a significant loss of property. In any case the officer shall operate his vehicle with due regard for public safety and shall bear in mind that his POV may not be quickly recognized as a vehicle responding to an emergency. . . . **Officers shall not make traffic stops, for any violation, while in their POV, unless such action is authorized by the Chief of Police.**.

Appendix-V, "Patrol procedures." to Police Department Manual Standard Operating Procedures #95-PDMSOP-1[Emphasis added].

Mr. Forrest contended that the Ridgetop Police Department's policy would cause him to violate his duty to uphold the law. This contention is without merit. When officers are "off duty," our statutes generally treat them as ordinary private citizens and not as an agents or employees of the municipal police department under a general duty to keep the peace. *White v. Revco Discount Drug Centers, Inc.* 33 S.W.3d 713, 720 (Tenn. 2000); *see, e.g.,* T.C.A. § 38-8-351 (1997) (allowing officers to participate in political activities when "off-duty and acting as a private citizen," but not when the officer is "on duty or acting in such officer's official capacity"); T.C.A. § 38-8-303 (1997)

(making distinction between "the performance of the officer's official duties" and the officer's "off-duty [private] employment" for purposes of disclosure in official investigations). Consequently, to the extent that Mr. Forrest's analysis focuses upon some continuous duty of police officers to keep the peace, that analysis fails in Tennessee. *Voss,* 958 S.W2d at 345.

Further, the Tennessee Supreme Court, acknowledging that public policy concerns are at the heart of the law on retaliatory discharge, has focused on the need to balance the employer's right to terminate an at-will employee and the employee's right to be protected from unlawful discharge. *Id.* at 344. Here, the regulation itself sets out the policy concern for the prohibition on an unmarked or private vehicle in an emergency pursuit, that is, the likelihood that the vehicle will not be recognized by the general public as an emergency vehicle. Mr. Forrest ignored this public policy concern when he failed to abide by the regulation. He jeopardized his own 'at will' employment status by failing to obey the regulation.

Reviewing the policy of the Ridgetop Police Department and Mr. Forrest's allegations, the Court finds that Mr. Forrest not only failed to demonstrate any emergency,[4] he failed to introduce evidence that the defendants' use of this policy constituted an illegal activity--namely, an activity "which is in violation of the criminal or civil code or regulations of this state or the United States or any regulation intended to protect the public health, safety or welfare." T.C.A. § 50-1-304(b); *Voss, supra* at 343. To the contrary, the quoted paragraph of the regulation merely establishes a procedure

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Mr. Forrest claimed that he had observed two individuals in a car passing a joint. Although he called dispatch to alert another officer, he continued pursuit of the vehicle into the city limits of Greenbriar. He later called dispatch and asked if the Greenbriar Police could stop the vehicle and they did. The individuals admitted to smoking marijuana but claimed that they did not have any marijuana in their car. Mr. Forrest searched the car and found a roach and later that day, he issued a warrant. When asked why he pursued a vehicle from Davidson County through the city and into a neighboring community for a minor infraction, he said that he was legally bound to enforce the law. At no time did Mr. Forrest describe a situation that threatened serious injury, death or a significant loss of property.

to be observed by a police officer when using his personal vehicle to respond to an *emergency*.

Mr. Forrest produced no evidence that the City of Ridgetop engages, or requires its officers to engage, in an illegal activity by having a policy prohibiting police officers from pursuing or otherwise using their personally owned vehicles in an emergency pursuit.

(v) Nondiscriminatory grounds for discharge. The defendants submit that Mr. Forrest was discharged for insubordination, disobeying a written directive, using a recording device at a police department staff meeting and using a privately owned vehicle to pursue a suspect outside the city limits. Examining the record in a light most favorable to Mr. Forrest, we cannot help but conclude that Mr. Forrest was insubordinate and disobedient. He admitted that he failed to call dispatch before pulling over a vehicle in violation of a written directive, although he claimed that he needed clarification on the mandatory nature of the directive. Mr. Forrest also admitted that he disobeyed a written memo directing that no written warnings be given, arguing that the memo did not address written warnings on citations.[5] Mr. Forrest admitted that he used a tape recorder at a police department staff meeting, despite being told that he could not use one. He did not disclose his tape recorder when the officers were asked whether anyone possessed a recorder, but waited until he was specifically asked. He later claimed that he was prevented from obtaining any evidence because of this restriction on recording devices. Finally, Mr. Forrest admitted that he used his own vehicle to pursue a suspect outside of the community, but asserted that the policy illegally prevented him from upholding state laws in accord with his sworn duty to do so.

[5] According to Mr. Forrest, the memo said nothing about notations of written warnings on traffic citations. In addition, he stated that a written warning differs from a citation that contains a written warning. He perceived the memo to mean "refrain from wasting paper and the clerk's time." Although the memo was issued on March 1, 1999, Mr. Forrest issued a traffic citation with a written warning on it on March 2, 1999 and again, on March 3, 1999. Only at the end of his shift on March 3, 1999, did he ask Chief Myers for clarification to be sure that he was in compliance. The chief said the memo applied to notations on citations. Mr. Forrest continued to assert that clarification was necessary.

IV. Conclusion

Clearly, the four incidents reported by Mr. Forrest can in no way be considered "illegal activities" within the meaning of the statute. There is no proof of any violation of any established public policy. Mr. Forrest admitted to insubordination and disobedience, yet quibbles about the reasons for his actions. He has also failed to demonstrate that the reasons given for his termination were pretextual. Accordingly, this court holds that the trial court properly granted summary judgment to the defendants on grounds that the plaintiff failed to establish a prima facie case.

That judgment of the trial court is hereby affirmed. This case is remanded for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant.

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SPECIAL JUDGE CAROL L. McCOY